Associated Cover Sdn Bhd v MCIS Insurance Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO R1–24–56 OF 2000
RAUS J
26 APRIL 2004

Arbitration — Award — Appeal — Plaintiff sought to enforce awards awarded by arbitrator — Defendant appealed to High Court and to Court of Appeal — Defendant applied for stay to stop plaintiff from enforcing the awards — Whether stay could be granted — Courts of Judicature Act 1964 s 73

Arbitration — Award — Enforcement — Plaintiff sought to enforce awards awarded by arbitrator — Defendant stated that plaintiff's conduct of not enforcing awards earlier was estoppel — Whether plaintiff's conduct estoppel

The plaintiff, in encl 1 sought to enforce arbitration awards. The orders sought are, inter alia, that the plaintiff be granted leave to enforce the interim arbitration award and the final arbitration award against the defendant. The defendant filed a summons in chambers (encl 6) seeking relief that the plaintiff's originating summons be stayed pending the disposal in finality including appeals of the plaintiff's originating summons and the plaintiff be restrained from commencing any proceedings seeking to enforce the arbitration awards.

The plaintiff and defendant executed a written agreement wherein the plaintiff was appointed by the defendant as an agent to sell a product known as 'Kinta Package'. Later, Bank Negara issued a direction for all insurance companies and as a result, the defendant informed the plaintiff that the rates of commission payable to the plaintiff were reduced. The plaintiff then terminated the agreement on the understanding by the plaintiff that the commissions for the policies sold before the direction should be continued at the original rates, which the defendant failed to pay. The plaintiff filed a civil proceeding but the defendant then obtained an order that the proceedings should be referred to arbitration. The arbitrator issued a final award whereby the defendant was directed to pay RM1,346,273 to the plaintiff. The defendant appealed but its appeal was dismissed with costs. The defendant appealed to the Court of Appeal. The appeal is still pending. The issue before this court was the defendant's application for a stay to stop the plaintiff from enforcing the awards and whether the plaintiff's conduct of not enforcing the award earlier was an estoppel. The defendant stated that the plaintiff would not be able to pay back the money if the defendant was successful in its appeal.

Held, allowing the plaintiff's application but dismissing the defendant's application:

(1) The law provides that an appeal does not operate as a stay of execution unless there was leave granted either by the court appealed from or from the Court of Appeal. This position has been stated in s 73 of the Courts of Judicature Act 1964. However, in determining such

application, the principles to be looked into are as being laid down in the case of *Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd* [2002] 3 MLJ 49 where the Court of Appeal in its judgment identified the duty of the court and the principles which need to be looked into when considering application for stay of execution (see paras 10 and 11).

(2) The grounds forwarded by the defendant were ordinary and did not reveal any special circumstances. It appeared that the only reason or ground shown was that the plaintiff would not be able to pay back the money if the judgment was enforced and in the event the defendant was successful in the appeal. But the plaintiff in their affidavit in reply, stated that the plaintiff's business was a viable and ongoing business. Thus, the burden was on the defendant to provide proof of the plaintiff's inability to pay back the money in the event the defendant is successful in the appeal. The defendant had failed to do so (see para 13).

(3) The parties had submitted to the jurisdiction of the learned arbitrator to settle their dispute. The learned arbitrator had issued his final award in favour of the plaintiff. The award being in monetary terms, the appeal would not be rendered nugatory, even if the defendant was successful in his appeal. The defendant would have his money back if the Court of Appeal resolved in the defendant's favour (see paras 14 and 15).

(4) On the contention by the defendant that the plaintiff's conduct of not pursuing to execute the award any earlier amounted to conduct of estoppel, as long as the plaintiff was not statute barred, the plaintiff was at liberty to seek leave to enforce the award at any time (see para 16).

[**Bahasa Malaysia summary**

Plaintif, di dalam kandungan 1, memohon menguatkuasakan award timbangtara. Perintah-perintah yang dipohon adalah, di antara lain, bahawa plaintif diberi kebenaran untuk menguatkuasakan award timbangtara interim dan award muktamad timbangtara terhadap defendan. Defendan telah memfailkan saman dalam kamar (kandungan 6) memohon relif bahawa usul pemula plaintif ditangguhkan sementara menunggu penyelesaian secara muktamad termasuk rayuan-rayuan usul pemula plaintif dan plaintif disekat daripada memulakan prosiding memohon penguatkuasaan award timbangtara.

Plaintif dan defendan telah melaksanakan perjanjian bertulis di mana plaintif dilantik sebagai agen oleh defendan untuk menjual produk bernama 'Kinta Package'. Kemudiannya, Bank Negara telah mengeluarkan satu arahan untuk semua syarikat insurans dan oleh itu, defendan telah memberitahu plaintif bahawa kadar komisen yang dibayar kepada plaintif dikurangkan. Plaintif kemudiannya menamatkan perjanjian itu pada persefahaman plaintif bahawa komisen-komisen polisi-polisi yang dijual

sebelum arahan itu patut dibayar pada kadar asal, yang gagal dibayar oleh defendan. Plaintif telah memfailkan satu prosiding sivil tetapi defendan telah memperolehi perintah bahawa prosiding itu dirujuk kepada timbangtara. Penimbangtara telah memberi award muktamad yang mengarahkan defendan membayar kepada plaintif RM1,346,273. Defendan telah merayu tetapi rayuan defendan telah ditolak dengan kos. Defendan merayu kepada Mahkamah Rayuan. Rayuan itu masih belum selesai. Isu di hadapan mahkamah ini adalah permohonan defendan untuk menyekat plaintif daripada menguatkuasakan award-award itu dan sama ada tindakan plaintif di dalam tidak menguatkuasakan award sebelum ini adalah estopel. Defendan menyatakan bahawa plaintif tidak dapat membayar balik wang itu jika defendan berjaya di dalam rayuannya.

Diputuskan, membenarkan permohonan plaintif tetapi menolak permohonan defendan:

(1) Undang-undang memperuntukkan bahawa rayuan tidak berfungsi sebagai penangguhan penguatkuasaan kecuali jika kebenaran diberikan sama ada dari mahkamah yang dirayukan daripada atau Mahkamah Rayuan. Ini telah dinyatakan di dalam s73 Akta Mahkamah Kehakiman 1964. Akan tetapi, di dalam menentukan permohonan seperti ini, prinsip-prinsip yang patut dipertimbangkan adalah seperti di dalam Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd [2002] 3 MLJ 49 di mana Mahkamah Rayuan di dalam penghakimannya mengenal pasti tanggungjawab mahkamah dan prinsip-prinsip yang patut dipertimbangkan semasa mempertimbangkan permohonan untuk penangguhan penguatkuasaan (lihat perenggan 10 dan 11).

(2) Alasan-alasan yang dihadapkan oleh defendan adalah hanya biasa dan tidak menunjukkan keadaan khas. Ia seakan-akan bahawa alasan yang dihadapkan adalah plaintif tidak dapat membayar balik wang itu jika award itu dikuatkuasakan dan defendan berjaya di dalam rayuannya. Tetapi, plaintif di dalam afidavit jawapannya, mengatakan bahawa perniagaan plaintif adalah berdaya maju dan berterusan. Oleh itu, defendan mempunyai beban untuk membuktikan bahawa plaintif tidak dapat membayar balik wang itu kepada defendan jika defendan berjaya di dalam rayuannya. Defendan gagal membuktikan ini (lihat perenggan 13).

(3) Parti-parti telah berserah kepada bidangkuasa penimbangtara yang arif untuk menyelesaikan pertikaian mereka. Penimbangtara yang arif telah mengeluarkan award muktamad beliau memihak plaintif. Memandangkan bahawa award itu adalah wang, rayuan itu tidak akan menjadi tidak berguna, jikapun defendan berjaya di dalam rayuannya. Defendan akan mendapatkan wangnya semula jika Mahkamah Rayuan memutuskan untuk defendan (lihat perenggan 14 dan 15).

(4) Pada hujahan defendan bahawa tindakan plaintif yang tidak menguatkuasakan award itu sebelum ini adalah estopel, selagi plaintif tidak dihalang statut plaintif boleh memohon relif pada bila-bila masa (lihat perenggan 16).]

Notes

For cases on appeals in arbitration, see 1 *Mallal's Digest* (4th Ed 2002 Reissue) paras 1155-1158.

For cases on enforcement of arbitration awards, see 1 *Mallal's Digest* (4th Ed 2002 Reissue) paras 1163-1173.

For challenging the award, see 13 *Halsbury's Laws of Malaysia*, paras [220.121] – [220.124].

For enforcement of award, see 13 *Halsbury's Laws of Malaysia*, paras [220.138] – [220.140].

Cases referred to

Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd [2002] 3 MLJ 49 (folld)

Legislation referred to

Courts of Judicature Act 1964 s 73

Ranjit Kaur (Christie Soosay Nathan & Associates) for the plaintiff
Joginder Singh (Hamzah Sulaiman & Partners) for the defendant

Raus J:

[1] Enclosure 1 is an application by the plaintiff dated 23 August 2000 seeking relief to enforce arbitration awards. The orders sought for are, inter alia, as follows:

(1) that the plaintiff be granted leave to enforce the Interim Arbitration Award dated 15 April 1985 and the Final Arbitration Award dated 5 November 1989 published by YM Raja Aziz Addruse, who had been appointed to conduct the above said arbitration, against MCIS Insurance Bhd, the defendant, as judgment or order to give effect to the same;

(2) that the defendant to pay the costs for this application and judgment or order subsequently entered pursuant to the above said order.

[2] Subsequent to the plaintiff's application, the defendant on 21 November 2000 filed a summons in chambers (encl 6) seeking relief that the plaintiff's originating summons be stayed. The orders sought for are, inter alia, as follows:

(1) that plaintiff's application per encl 1 be stayed pending the disposal in finality including appeals if any of Kuala Lumpur High Court (Bahagian Rayuan dan Kuasa-Kuasa Khas) Usul Pemula No: R1-25-127-1999;

(2) the plaintiff be restrained from commencing any other proceedings seeking from the High Court to enforce the Final Award of the Arbitrator YM Raja Addruse dated 5 November 1999 pending the disposal in finality of Kuala Lumpur High Court (Bahagian Rayuan Dan Kuasa-Kuasa Khas) Usul Pemula No: R1-25-127-1999.

[3] On the hearing date, both parties agreed that encl 6 should be heard first. Briefly, the facts of the case are as follows: **A**

[4] The plaintiff and the defendant executed a written agreement on 10 January 1987 ('the agreement') wherein the plaintiff was appointed by the defendant as an agent to sell an insurance product known as 'Kinta Package' commencing from 1 May 1986. However, on 27 December 1990, **B** Bank Negara Malaysia had issued a direction known as 'Guidelines to Control Operating Costs of General Insurance Business' for all insurance companies. As the result of the said Bank Negara's direction, the defendant by their letter dated 21 January 1991 gave notice to the plaintiff that the rates of commission which were payable by the defendant to the plaintiff pursuant to the said Agreement would be reduced. By a letter dated 13 **C** March 1991 from the plaintiff to the defendant, the plaintiff terminated the Kinta Package agreement on the understanding by the plaintiff that the commissions for the policies sold before the Bank Negara's direction was issued should be continued at the original rates.

[5] The defendant failed to pay the original commission rate agreed for **D** policies issued before the direction from Bank Negara. Accordingly, on 17 October 1991, the plaintiff instituted a civil proceeding against the defendant in the Shah Alam Sessions Court. The defendant, thereafter filed an application in the sessions court proceedings and obtained an order that the said proceedings be stayed on the grounds that the said dispute should **E** be referred to arbitration.

[6] On 19 October 1993, YM Raja Aziz Addruse accepted his appointment as the arbitrator with regard to the said dispute. By a letter dated 14 January 1994 YM Raja Addruse set-out the draft interlocutory directions for the conduct of the said arbitration proceedings. Subsequently **F** the learned arbitrator conducted the arbitration proceedings and heard evidence and on 15 April 1995, the arbitrator issued an Interim Award on the issue of liability.

[7] On 5 November 1999, the arbitrator issued his Final Award whereby the defendant was directed to pay RM1,346,273 being the total amount of **G** payment to which the plaintiff is entitled under the agreement arising from the termination.

[8] The defendant being dissatisfied with the Interim Award and the Final Award of the learned arbitrator filed an Usul Pemula No: R1-25-127-1999 to set aside or remit to the learned arbitrator the awards. The case was **H** heard before his Lordship Dato' KC Vohrah and on 23 March 2001, the defendant's application was dismissed with costs. The defendant appealed against the said decision to the Court of Appeal. The appeal is still pending.

[9] Therefore, the issue before this court is whether defendant's application for a stay to stop the plaintiff from enforcing the awards pending **I** final disposal of the appeal and whether plaintiff's conduct of not enforcing the award earlier amounts to an estoppel.

[10] The law provides that an appeal does not operate as a stay of execution unless there was leave granted either by the court appealed from or from the Court of Appeal. This position has been stated in s 73 of the Courts of Judicature Act 1964 which read as follows:

> 73 Appeal not to operate as stay of execution.
>
> An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the court below or the Court of Appeal so orders and no intermediate act or proceeding shall be invalidated except so far as the Court of Appeal may direct.

[11] However, in determining such application, the principles to be looked into are as being laid down in the case of *Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd* [2002] 3 MLJ 49 where the Court of Appeal in its judgment identified the duty of the court and the principles which need to be looked into when considering application for stay of execution. Abdul Hamid Mohamad JCA (now FCJ) summarized it as follows at p 50:

> A successful litigant should not be deprived of the fruits of a judgment obtained in his favour, unless there are special circumstances (or special grounds) that justify a stay of execution to be granted. The special circumstances must be special, not ordinary, common or usual circumstances and that go to the execution of the judgment and not to the validity or correctness of the judgment (or merits of the appeal).

[12] In the present application, counsel for the defendant submitted that plaintiff's conduct of not enforcing the award earlier amounts to conduct of estoppel since this case is now on appeal. In furtherance to that, the defendant submits that plaintiff will not be able to pay back the money if the judgment is enforced and in the event that the Court of Appeal resolved in the defendant's favour.

[13] I am of the view that the grounds forwarded by the defendant are merely ordinary and do not reveal of any special circumstances. It appears to me that the only reason or ground shown is that the plaintiff would not be able to pay back the money if the judgment is enforced and in the event the defendant is successful in the appeal. But the plaintiff in their affidavit in reply affirmed by Santharam Christie on 4 December 2000, stated that the plaintiff's business is a viable and ongoing business. Thus, the burden is on the defendant to provide proof of the plaintiff's inability to pay back the money in the event the defendant is successful in the appeal. The defendant had failed to do so.

[14] It must be noted that, the parties in this case had submitted to the jurisdiction of the learned arbitrator to settle their dispute. The learned arbitrator had on 9 November 1999 issued his final award in favour of the plaintiff. The defendant had challenged the award by making an application before the High Court to set aside the award or remit it to the learned arbitrator. The application was dismissed by the High Court. No doubt, the defendant is appealing against the said decision to the Court of Appeal but I am of the view that the plaintiff should not continue to be deprived the fruits of the award obtained in his favour.

[15] To me, the award being in monetary terms, the appeal will not be rendered nugatory, even if the defendant is successful in his appeal. The defendant will have his money back if the Court of Appeal resolved in the defendant's favour.

[16] Thus, I have no alternative but to dismiss the defendant's application as in encl 6. With regard to encl 1, I am of the view since execution is a natural proceed after obtaining a judgment, I find no reason not to allow this application. On the contention by the defendant that the plaintiff's conduct of not pursuing to execute the award any earlier amounts to conduct of estoppel, I am of the view that as long as the plaintiff is not statute barred, the plaintiff is at liberty to seek leave to enforce the award at any time.

[17] Accordingly, the defendant's application as in encl 6 is dismissed with costs while the plaintiff's application in encl 1 is allowed with costs.

Plaintiff's application allowed and defendant's application dismissed.

Reported by Chew Phye Ken